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In the Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SW GENERAL, INC., DOING BUSINESS AS SOUTHWEST AMBULANCE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

IAN HEATH GERSHENGORN
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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The Federal Vacancies Reform Act of 1998 (FVRA or Act), 5 U.S.C. 3345 *et seq.*, makes three categories of officials eligible to temporarily perform the functions and duties of a vacant presidentially appointed, Senate-confirmed (PAS) office: first assistants to the vacant office (under Subsection (a)(1)), holders of other PAS offices designated by the President (under Subsection (a)(2)), and employees designated by the President who have been senior officials in the agency where the vacancy arises for at least 90 days in the year preceding the vacancy (under Subsection (a)(3)). Subsection (b)(1) then sets out limitations that it makes applicable "[n]otwithstanding" only one of those three categories—the first assistants covered by Subsection (a)(1).

Since the time of the FVRA's enactment, without objection by Congress, Presidents of both parties have

collectively made more than 100 nominations and designations based on the understanding that the limitations in Subsection (b)(1) apply only to first assistants serving under Subsection (a)(1). That settled understanding best accords with the text, objectives, and history of the statute. It avoids attributing to Congress an intent to eliminate *sub silentio* a mechanism for simultaneous service and nomination of PAS officials that had existed without apparent congressional objection for more than a century. And it properly gives significant weight to the manner in which the FVRA has been implemented by the Branches whose prerogatives it addresses.

A. The Executive's Longstanding Interpretation Represents The Best Reading Of The FVRA

The three subsections in Section 3345(a) create three separate paths for becoming an acting official. The terms of each subsection apply in an equally categorical manner when triggered. Yet Section 3345(b) imposes a limitation that applies "[n]otwithstanding" only *one* of these subsections—"subsection (a)(1)." That directive, reinforced by structural features of the statute, establishes that Subsection (b) does not override the separate mechanisms for acting service in Subsections (a)(2) and (a)(3). Respondent fails in its attempts to explain away the statutory design.

1. a. Respondent acknowledges (Br. 40) that when included and omitted items in a statute are both "members of an 'associated group or series,'" it is normally appropriate to infer that the omitted items were "excluded by deliberate choice." Gov't Br. 28 (quoting *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 168 (2003)). That principle applies here. Subsections (a)(1), (a)(2) and (a)(3) are members of an associated

group: they were enacted at the same time, in the same statutory subsection, and they provide authorization for the same acting status, subject to the same time limits, with the same penalties for violations. See *id.* at 29-30. Congress's directive that Subsection (b)(1) overrides only the mechanism for acting service by first assistants in Subsection (a)(1) thus indicates that Congress did not intend Subsection (b)(1) to override the alternative mechanisms for acting service in Subsections (a)(2) and (a)(3).

Respondent suggests (Br. 40-41) that Congress might have specified that Subsection (b)(1) overrides only Subsection (a)(1) because Subsection (b)(1) conflicts only with that subsection. That is not so. Subsections (a)(2) and (a)(3) grant the President an unqualified power to "direct a person" who already holds a PAS post or who occupies a senior agency position "to perform the functions and duties of the vacant office temporarily in an acting capacity." 5 U.S.C. 3345(a)(2)-(3). Subsection (b)(1) conflicts with that authorization, too.

Respondent also seeks to avoid application of the *expressio/exclusio* canon by hypothesizing (Br. 40-41) that a different background rule governs conflicts that involve provisions that "grant the President discretion" as compared to provisions that operate "automatically." But respondent identifies no authority suggesting that when a statutory provision is automatic, a "notwithstanding" provision is needed to resolve a conflict with that provision, but that when a provision confers discretion on a government official, no "notwithstanding" provision is called for. On the contrary, in the absence of express textual indicators, the same default principle—that "the specific governs

the general"—would resolve the conflict between each of the three mechanisms in Subsection (a) and Subsection (b)(1). *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012) (citation omitted); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 183-188 (2012).

That principle applies whether a conflict involves a discretionary grant of permission or an automatic rule. See, *e.g.*, *RadLAX*, 132 S. Ct. at 2071 (noting that specific "permission" takes precedence over a general "prohibition" and vice versa); *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 378-379, 384-385 (1992) (applying general/specific canon in context of non-discretionary rule). Respondent's examples of statutes in which a grant of discretion is cabined by a narrower limitation (Br. 41-42) do not involve "notwithstanding" clauses at all, much less a clause (like in Subsection (b)(1)) expressly made applicable to only one of a series of statutory provisions. And they simply reflect application of the general/specific canon.

There is, in short, no canon that explains Congress's disparate treatment of the mechanisms for acting service in Subsections (a)(1), (a)(2) and (a)(3) other than the canon invoked by the government (as well as the author of Subsection (b)(1))—*expressio unius est exclusio alterius*. See 144 Cong. Rec. 27,496 (1998) (statement of Sen. Thompson) (explaining that "the revised reference to § 3345(a)(1)" in Subsection (b)(1) "means that this subsection applies only when the acting officer is the first assistant, and not when the acting officer is designated by the President pursuant to §§ 3345(a)(2) or 3345(a)(3)").

b. Respondent's other principal argument misstates the government's position. Respondent emphasizes (Br. 28-29) that "notwithstanding" means "in spite of"—so that the notwithstanding clause "mak[es] clear that Section 3345(b)(1)'s restrictions override Section 3345(a)(1)'s mandate." *Id.* at 29. As explained in the government's opening brief (Br. 27), the government agrees that "notwithstanding" clauses serve exactly that function, "dictat[ing] which contradictory provision is to prevail." *Ibid.* (citation omitted). But as respondent ultimately concedes (Br. 40), under the *expressio/exclusio* canon, a statement that a rule *does* prevail over one member of an associated group commonly signals that the rule *does not* prevail over other members of the same group that are not mentioned. Gov't Br. 27-30.

Because respondent is wrong in asserting that the government contests the ordinary meaning of "notwithstanding," the court of appeals decisions respondent invokes, interpreting statutes other than the FVRA (Br. 39-40), do not bear on the issue in this case. None of those decisions addressed a provision with a "notwithstanding" clause that overrode only one of several subsections with which it conflicted. *In re Lifschultz Fast Freight Corp.*, 63 F.3d 621 (7th Cir. 1995), construed 49 U.S.C. 10701(f) (1995), which specified that small businesses "shall not be liable" for "undercharge" claims by freight carriers, "[n]otwithstanding" each of the three statutory mechanisms that otherwise provided for satisfaction of undercharge claims. 63 F.3d at 630-631. There was no additional provision governing satisfaction of undercharge claims that Congress chose not to override through the "notwithstanding" clause. *Deutsche Bank National Trust*

Co. v. *Tucker*, 621 F.3d 460 (6th Cir. 2010), is even further afield: it stands for the uncontroversial proposition that a "notwithstanding" clause overrides the provision it expressly mentions. *Id.* at 463-464 (section providing that the amount to cure default should be calculated in accordance with any underlying contract, "[n]otwithstanding . . . section[] 506(b)," overrides method of calculation in Section 506(b) of Title 11) (brackets in original).

Notably, in several decisions that do address "notwithstanding" provisions that override only one of several associated statutory mechanisms, courts (including this Court) have recognized an inference of *expressio/exclusio*. See *Preseault* v. *ICC*, 494 U.S. 1, 13-14 (1990) (concluding that when a provision stated that spending limits in the provision were applicable "[n]otwithstanding any other provision of *this* Act," the National Trails Act Amendments of 1983, Pub. L. No. 98-11, Tit. II, 97 Stat. 42, the "notwithstanding" clause evidenced that the limitation "speaks only to appropriations under the [National Trails Act Amendments of 1983] and not to relief available under the Tucker Act") (emphasis in original); *Shomberg* v. *United States*, 348 U.S. 540, 545 (1955) (concluding that provision specifying that immigration limit applied "'[n]otwithstanding the provisions of section 405(b),' * * * at first glance might indicate that it was not intended to apply to [Section] 405(a)," but finding that other features of statutory structure and history counseled different interpretation); see also *SEC* v. *Mount Vernon Mem'l Park*, 664 F.2d 1358, 1363 (9th Cir.) (concluding that when Subsections (a)(1), (a)(2) and (a)(3) defined "investment companies," and Subsection (b)(1) provided an exemption to

investment-company status "[n]otwithstanding paragraph (3) of subsection (a)," the exemption overrode only Subsection (a)(3), and not Subsections (a)(1) and (a)(2)), cert. denied, 456 U.S. 961 (1982) (brackets in original; citation omitted).

The government's "notwithstanding" argument, moreover, is bolstered by a related aspect of the text to which respondent offers no meaningful response. As the government's opening brief explains (Br. 30), three other places in Section 3345 have directly parallel "notwithstanding" clauses referring to Subsection (a)(1), and all override only the automatic accession rule in Subsection (a)(1). Respondent does not deny the point, and even acknowledges (Br. 28) that the FVRA's "notwithstanding" clauses should be read consistently. Yet respondent introduces asymmetry, by reading Subsection (b)(1)'s "notwithstanding" clause as though it said "notwithstanding subsection (a)"—or "notwithstanding subsections (a)(1), (a)(2), and (a)(3)"—rather than "notwithstanding subsection (a)(1)."

c. Respondent's remaining textual arguments lack merit. Like the court of appeals, respondent focuses (Br. 24-27) on the reference to a "person" and "this section" in Subsection (b)(1)'s second clause, contending that these usages show that Subsection (b)(1) overrides the entirety of Subsection (a). That contention falls short.

First, Congress's use of the term "person" simply reflects that Subsection (b)(1) refers to an individual both in his official capacity as a first assistant and in his personal capacity as a nominee. The term "person" is used to embrace both. And the phrase "under this section" makes clear that Subsection (b)(1) re-

stricts service upon nomination only by first assistants who are serving in an acting capacity pursuant to the FVRA, and not by first assistants serving pursuant to any of the other statutes providing mechanisms for acting service.

Second, respondent fails to account for the equally broad language authorizing acting service in Subsections (a)(2) and (a)(3). 5 U.S.C. 3345(a)(2) (authorizing designation of any "person" who serves in a PAS position, subject only to "the time limitations of section 3346"); 5 U.S.C. 3345(a)(3) (authorizing designation of any "officer or employee" meeting specified criteria, subject only to "the time limitations of section 3346"). The question is not whether the "person" and "this section" language in Subsection (b)(1) is broad; the question is how to reconcile the language in Subsection (b)(1) with equally broad language in Subsections (a)(1), (a)(2) and (a)(3). Congress resolved that question through the "notwithstanding" clause, which directs that Subsection (b)(1) take precedence over only Subsection (a)(1), and not Subsection (a)(2) or (a)(3).

Third, respondent's focus on "person" and "this section" in Subsection (b)(1) fails to account for related FVRA provisions. As the government observes in its opening brief (Br. 34), the very next subsection, Subsection (b)(2), speaks of a "person" rather than a "first assistant" in the context of a provision that applies solely to first assistants. Indeed, the language in Subsection (b)(1) on which respondent relies was carried over from an earlier draft that used the terms "person" and "this section" even though it imposed limitations that were indisputably applicable only to first assistants. *Ibid.* That makes it particularly in-

appropriate to infer from "person" and "under this section" that Subsection (b)(1) was intended to cover non-first-assistants.

Finally, as the American Federation of Labor and Congress of Industrial Organizations observes (Amicus Br. 12-13), Subsection (c)(1) also contradicts respondent's understanding of the "person" and "this section" language. If the limitations on acting service that Subsection (b)(1) imposes only "[n]otwithstanding subsection (a)(1)" actually applied to all "persons" serving in an acting capacity under Section 3345, then Subsection (b)(1) would nullify Subsection (c)(1), which authorizes the President to direct an officer to continue to serve in a vacant PAS office when renominated without a break in service for a subsequent term in office. 5 U.S.C. 3345(c)(1).[1] Respondent acknowledges that cannot be so (Br. 45-46), and accordingly would read Subsection (b)(1), which expressly overrides only Sub-

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[1] Respondent is mistaken in suggesting (Br. 45-46) that nominees whose terms have expired are not engaged in "acting service" when they perform the duties of their former posts under Subsection (c)(1). The FVRA makes clear that "expiration of a term of office" gives rise to an "inability to perform the functions and duties of such office," 5 U.S.C. 3345(c)(2), triggering the President's authority to designate an acting officer, 5 U.S.C. 3345(a); see Guidance on Application of Federal Vacancies Reform Act of 1998, 23 Op. O.L.C. 60, 65-66 (1999) (explaining that Section 3345(c)(2) is an authorization of acting service); Inapplicability of the Federal Vacancies Reform Act's Reporting Requirements When PAS Officers Serve Under Statutory Holdover Provisions, 23 Op. O.L.C. 178, 179 (1999) (describing Section 3345(c) as "creating an additional class of acting officers"). And Congress placed Subsection (c)(1) within the FVRA provision entitled "Acting officer" and subjected individuals serving under Subsection (c)(1) to the time limits for how long an "acting officer * * * may serve." 5 U.S.C. 3345(c)(1), 3346(a).

section (a)(1), to override Subsections (a)(1), (a)(2), and (a)(3), but not Subsection (c)(1). In particular, respondent argues that Subsection (c)(1) may nevertheless take precedence over Subsection (b)(1) despite the latter's "person" and "this section" language if the two provisions are reconciled using other principles of interpretation. Resp. Br. 45-46 (citing general/specific canon). But that is just the government's point. When two provisions set out conflicting directives, surrounding text and canons determine which takes precedence. Here, the "notwithstanding" clause overriding Subsection (a)(1) alone indicates that the limits in Subsection (b)(1) do not override the parallel acting-service mechanisms in Subsections (a)(2) and (a)(3).

d. Respondent's superfluity arguments fare no better. Respondent first asserts a superfluity that no court has ever found. It argues (Br. 29-30) that the government renders superfluous the provision for automatic continued service by Senate-confirmed first assistants in Subsection (b)(2) because under the government's view, in the absence of Subsection (b)(2), the President could designate Senate-confirmed first assistants to serve in an acting capacity under Subsection (a)(2). To state this argument is to refute it: because Subsection (a)(2) requires a presidential designation, the provision in Subsection (b)(2) allowing continued *automatic* service by Senate-confirmed first assistants is consequential when the President has not yet chosen whom he wishes to serve as the acting official. Indeed, provisions for automatic service spare the President from having to make any designation at all.

Respondent also repeats (Br. 31) the court of appeals' suggestion that the government's interpretation might render Subsection (b)(1)(A)(i) superfluous. But

respondent does not dispute that there is no superfluity so long as Subsection (a)(1) applies to individuals who become first assistants after vacancies arise—for example, those who become first assistant to a vacant office at the start of an administration. That reading of Subsection (a)(1) is correct, as the Department of Justice's Office of Legal Counsel (OLC) and the Government Accountability Office (GAO) each concluded (see Gov't Br. 36), and respondent advances no argument to the contrary.

Finally, contrary to respondent's contention (Br. 30-31), the government's interpretation does not render Subsection (b)(2)(A) superfluous. Subsection (b)(2)(A) is in a provision that carves out an exception based in part on *current* service to Subsection (b)(1)'s bar based on insufficient *past* service, and it enhances clarity by making the bar in Subsection (b) self-contained. That point is not contradicted by respondent's sole response (Br. 31)—that Subsection (b)(*2*) does not refer to nomination—because Subsection (b)(*1*) makes clear that all of Subsection (b) applies only to persons who are nominated.

B. The Executive's Interpretation Aligns With The Statute's Objectives

The manner in which the FVRA has been applied since its enactment accords with the statute's design. Respondent's reading, in contrast, would produce disparities that bear no relationship to the statute's goals.

1. Respondent's reading of the FVRA would undo nearly 150 years of practice under the Act of July 23, 1868 (Vacancies Act), ch. 227, 15 Stat. 168, by forbidding virtually all PAS officers from simultaneously serving as nominee and acting official. But it would be

surpassingly strange for Congress to have undone such a longstanding practice without any discussion or explanation as to why Congress would have allowed non-Senate-confirmed first assistants to serve in an acting capacity when nominated, but would have forbidden such acting service by Senate-confirmed individuals. As respondent acknowledges (Br. 7-11), the FVRA was enacted in response to a lengthy history of congressional objection to acting designations that were seen as evasions or abuses of the Vacancies Act framework. Those objections were well-documented in floor statements, hearings, and reports. But respondent is unable to identify an occasion on which even a single Member of Congress either criticized acting service by Senate-confirmed officers, including those nominated to fill positions on a permanent basis, or suggested that the practice be modified. And none of the bills to address perceived abuses of the Vacancies Act would have done so. Gov't Br. 9 n.1.

Respondent hypothesizes (Br. 50-52) that Congress could have silently harbored a desire to rescind that longstanding authorization, because it could have feared that an individual confirmed for one PAS post would be ill prepared for the duties of a different, vacant post. But that hypothesis is wholly unsupported by the history surrounding the FVRA. And while respondent hypothesizes (Br. 52) that Congress might have developed this unarticulated concern "because the pool of eligible acting officers had grown dramatically in the 130 years between the passage of the FVRA and the Vacancies Act," the number of PAS officers then was comparable to the number of such officers today, because many minor posts required Senate confirmation at the time of the Vacancies Act's

enactment. Compare 17 Journal of the Executive Proceedings of the Senate of the United States from March 5, 1869 to March 3, 1871, Inclusive (1901) (listing over 1600 presidential nominations to non-military, non-judicial PAS posts in just the last ten months of 1869, the year after the Vacancies Act's passage), with Resp. Br. 50 (stating that there now exist more than 1200 PAS posts).[2]

Moreover, an unarticulated concern regarding PAS officers' qualifications cannot account for the result that respondent's reading would achieve. Even under respondent's view, the FVRA allows a PAS official to serve in an acting capacity in a vacant post as long as the official is not also the President's nominee. Respondent's qualifications hypothesis cannot explain why Congress would have prohibited acting service by a PAS official only when the President considers the official so well qualified as to warrant serving in the position permanently.

The weakness of respondent's hypothesis is underscored by the fact that the non-Senate-confirmed first assistants who can be the nominee under its interpretation are often political appointees who have never been subjected to Senate confirmation at all. Indeed, concern about acting service by non-Senate-confirmed individuals was a central impetus for the FVRA. If the FVRA were designed to prevent the President from authorizing acting service by a nominee "before the Senate approves," Resp. Br. 33, it would not have barred acting service by nominees *already* found

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[2] In practice, when Senate-confirmed individuals are designated as acting, the vast majority come from the agency with the vacancy, and most others come from closely related agencies or positions. See Gov't Br. App. 1a-81a.

qualified by the Senate for high-ranking government positions, while at the same time permitting acting service by first assistants with a mere 90 days of prior service who have never received confirmation.

2. Respondent alternatively asserts (Br. 32) that the disparities its interpretation produces could be explained by the objective of preventing the President from "install[ing] his chosen officeholder to perform the duties of a PAS office without obtaining the Senate's approval"—a form of acting service that respondent asserts Congress saw as circumventing "the Senate's role under the Appointments Clause." *Ibid.*

This argument is equally flawed. Respondent identifies no support in the extensive FVRA record for its hypothesis that Congress saw a circumvention of the Senate's prerogatives whenever the President designated his nominee to perform acting duties. Rather, Congress's concern was that the Executive Branch was encroaching upon the Senate's advice-and-consent role because it was failing to abide by the limits that Congress had set out in the Vacancies Act. See S. Rep. No. 250, 105th Cong., 2d Sess. 3-9 (1998) (*Senate Report*) (explaining the "need for legislation"); *Oversight of the Implementation of the Vacancies Act: Hearing Before the Senate Comm. on Governmental Affairs*, 105th Cong., 2d Sess. 1-25 (1998) (many Senators' statements regarding reasons for enactment).

In any event, respondent's hypothesis again fails to explain the disparities that its reading produces. If Congress wished to bar Presidents from "put[ting] their ultimate choice for a vacant position to work" without Senate approval (Resp. Br. 32), it would make little sense to bar simultaneous service by PAS officials and senior agency employees, while permitting

such service by first assistants who can often be political appointees with close ties to the President.

3. The disparities that respondent's reading produces are particularly anomalous because an important goal of the FVRA was to give Presidents additional flexibility to make acting designations, in exchange for barring the types of designations that Congress had seen as evasions. See Gov't Br. 39-41.

Respondent seeks to minimize the extent to which its interpretation undermines presidential flexibility and good government by arguing (Br. 47) that its interpretation merely removes one person from the pool of acting officers. But the person respondent would remove is the person the President deems most qualified for the post. It would significantly undermine Congress's objective to construe the FVRA to bar service under Subsections (a)(2) and (a)(3) whenever the President concludes the designated person is most qualified to serve permanently. Particularly given that PAS positions include critical national security, intelligence, and public safety posts, respondent errs in minimizing the costs of requiring the selection of less suitable candidates and forcing potentially disruptive leadership changes. See Gov't Br. 40-41.

4. In contrast to respondent's interpretation, the interpretation of the statute that has long been applied by the Executive reflects Congress's declared objectives and creates no unexplained disparities. Under the Executive's interpretation, Subsection (b)(1) responds to a concern that animated the passage of the FVRA: curtailing acting designations based on eleventh-hour first assistant appointments from outside the government that Members of Congress saw as attempts to manipulate the categories of

congressionally authorized acting service. That was the concern that the Senate Report explained was addressed by the first-assistant length-of-service limitations. *Senate Report* 13; see also 144 Cong. Rec. at 12,431-12,432 (statement of Sen. Thompson on behalf of sponsors). That objective does not support extending the first-assistant-centric limits of Subsection (b)(1) to individuals serving under Subsections (a)(2) and (a)(3), because those provisions contain parallel safeguards against eleventh-hour appointments to circumvent Congress's category-of-service restrictions—by requiring either prior Senate confirmation or 90 days of prior service as a senior agency employee. See Gov't Br. 41-42.[3]

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[3] Contrary to respondent's assertion (Br. 35-37), no background constitutional principle supports respondent's interpretation. Because statutes enabling Executive Branch officials to carry out the responsibilities of vacant offices have existed since the Founding Era (see Gov't Br. 4), there can be no serious question about their constitutionality. And respondent does not assert that there actually would be any question of the constitutionality of the FVRA as it has long been understood.

Respondent, moreover, does not adhere to a "constitutional 'norm'" of permitting only "Senate-confirmed 'Officers of the United States'" to perform important governmental functions (Br. 36), because respondent would disqualify non-Senate-confirmed individuals from acting service only upon nomination. Such a restriction is more properly viewed as an unusual encroachment upon the President's authority to "nominate * * * Officers of the United States," U.S. Const. Art. II, § 2, Cl. 2, than as a protection of the Senate's confirmation prerogative. Further, because respondent would give priority to acting service by non-Senate-confirmed first assistants over Senate-confirmed officers designated under Subsection (a)(2), respondent's interpretation actually disfavors service in accordance with the "norm" of Senate confirmation. And because respondent would bar acting service only

C. Legislative History Strongly Supports The Executive's Interpretation

As the government's opening brief outlines, the FVRA as initially drafted undisputedly restricted acting service by a nominee only for recently appointed first assistants. The subsequent linguistic changes were the product of many Senators' refusal to allow cloture until the bill was revised to give Presidents *more* flexibility, including by reducing the time-in-service requirement that applied (and was repeatedly described as applying) only to first assistants. That context counsels strongly against respondent's reading of Subsection (b)(1). Gov't Br. 45-48.

Respondent does not dispute the events that led to the bill's revision. Respondent nonetheless asserts (Br. 47) that if Congress intended only to reduce the time-in-service requirement for first assistants in the reported bill, "Congress would have simply replaced '180 days' with '90 days' without making substantial other changes." But Congress made a number of liberalizing changes, including adding an entirely new Subsection (b)(2) that expanded the bounds of permissible first-assistant service; revising Subsection (a)(1) so that it expressly permits first assistants to serve in an acting capacity even if they become first assistants after a vacancy arises, see *id.* at 36; and authorizing service by senior agency officials under Subsection (a)(3). The manner in which the Senate revised Subsection (b)(1) as part of that process—by stating that Subsection (b)(1) applies "notwithstanding" only the

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when a nomination has occurred, respondent's construction would have the ironic effect of encouraging the President *not* to present his preferred candidate to the Senate—particularly toward the end of an Administration.

first-assistant mechanism for acting service—ensured that all Subsection (a)(1) first assistants were subject to the limits in Subsection (b)(1), while other acting officials were not subject to those first-assistant-focused limits. 5 U.S.C. 3345(b)(1).[4] As the amendment's author explained, "the revised reference to § 3345(a)(1)" in Subsection (b)(1) "means that this subsection applies *only* when the acting officer is the first assistant, *and not when the acting officer is designated by the President pursuant to §§ 3345(a)(2) or 3345(a)(3)*." 144 Cong. Rec. at 27,496 (statement of Sen. Thompson) (emphasis added).

In rejecting the drafter's understanding, respondent places substantial reliance on a passing statement by Senator Byrd. But while Senator Byrd was among the sponsors of the initial version of the FVRA, he was not the author of the later amendment that created the restriction at issue here. Senator Thompson was. See 144 Cong. Rec. at 22,015. And examination of Senator Byrd's statements shows that far from "describ[ing] the operation of all of Section 3345 in detail," Resp. Br. 53, Senator Byrd omitted parts of the scheme—for instance, by failing to acknowledge that a vacancy can be filled on an acting basis by a person previously Senate-confirmed for the post, pursuant to Section 3345(c)(1). And his paraphrase contains nu-

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[4] Without Congress's revision of Subsection (b)(1), the subsection would have applied only to first assistants in place before the vacancy arose—those who had served as first assistant to the last PAS "officer"—but not to later-appointed first assistants, such as first assistants who came in at the start of an Administration when a vacancy already existed. See *Senate Report* 25 (initial draft specifying that Subsection (b)(1) applies only to those "serv[ing] in the position of first assistant to such officer" on the date of the vacancy).

merous loose descriptions that do not accurately capture the contours of permitted acting service.[5] The explanation by the author of Subsection (b)(1), which specifically addressed the meaning of its "notwithstanding" clause, is a better guide to the subsection's meaning.

D. Longstanding Practice Deserves Significant Weight In Construing The FVRA's Allocation Of Power Between The Elected Branches

Within months after the FVRA's passage, OLC set out its understanding that the limitation in Subsection (b)(1) applies only to first assistants. GAO later reached the same conclusion, and the three Presidents since the FVRA's enactment have collectively made over 100 nominations relying on that determination. That clear history, unaccompanied by any Senate objection before the decision below, is entitled to great weight. See Gov't Br. 48-55.

1. Respondent urges this Court (Br. 54-56) to discount that contemporaneous and longstanding construction on the theory that the Senate somehow may not have observed the manner in which the statute

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[5] For instance, Senator Byrd asserted that a person could not be the nominee and acting officer if "(1)(a) he is not the first assistant, or (b) he has been the first assistant for less than 90 of the past 365 days, and has not been confirmed for the position." 144 Cong. Rec. at 27,498. But the FVRA *does* permit a person to serve as acting officer and nominee if "he is not the first assistant," *ibid.*, when the official had at least 90 days of service as first assistant in the year before the vacancy arose—even if the official then left the first assistant position. 5 U.S.C. 3345(b)(1). And the FVRA does *not* permit all individuals who served as first assistant for "90 of the past 365 days," to serve as both acting official and nominee; the individual must have served that period in the year before the vacancy arose. 144 Cong. Rec. at 27,498.

was implemented by every Administration, vacancy after vacancy, since its enactment. That assertion is mistaken several times over.

As the government's opening brief explains, the interpretation of the statute that has prevailed since its enactment has been embodied both in appointments practice and in published opinions of both the OLC and GAO. Respondent fails to explain how the Senate could have failed to "kn[o]w about * * * the Executive's" supposed "misinterpretation of the FVRA" (Br. 54) when the Executive Branch announced that interpretation shortly after the statute was enacted and openly implemented it in high-profile appointments from the start.

Indeed, respondent's hypothesis of Senate ignorance is particularly hard to accept given that GAO—an arm of Congress that has overseen appointment practices since before the FVRA and has an oversight role under the FVRA itself (Gov't Br. 50-51)—adopted the Executive's construction in response to a request for guidance from the chairman of the Senate Committee on Governmental Affairs, in a memorandum disseminated publicly and to committee members. See Letter from Carlotta C. Joyner, Dir., Strategic Issues, to Fred Thompson, Chairman, U.S. Senate Comm. on Governmental Affairs, *Eligibility Criteria for Individuals to Temporarily Fill Vacant Positions Under the Federal Vacancies Reform Act of 1998*, GAO-01-468R, at 4-5 (Feb. 23, 2001), http://www.gao.gov/assets/80/75036.pdf (Joyner).

Respondent errs in suggesting (Br. 55) that GAO did not speak to whether Subsection (b)(1) applies to acting officials other than first assistants. GAO described "the four ways that an individual may be eligi-

ble to serve as an acting official *and the eligibility criteria for each situation*." Joyner 2 (emphasis added). After including the limits of Subsection (b)(1) in its description of the criteria for first assistants serving under Subsection (a)(1), GAO omitted those limits when describing the requirements for acting service by PAS officials and senior agency personnel under Subsections (a)(2) and (a)(3). *Ibid.* GAO stated that the FVRA "does not impose any limitation on which PAS officials the President may designate," and further stated that the FVRA imposes three limitations (none which has to do with nomination status) on senior agency employees eligible to serve. *Id.* at 2-3. Even respondent previously described GAO's guidance as "assuming * * * that Section 3345(b)(1)'s prohibition applies only to first assistants." Br. in Opp. 22.

Moreover, as the government's opening brief sets out (Br. 51-54 & App. 1a-81a), Presidents have acted on OLC and GAO's understanding from the time of the FVRA's enactment. The Senate has routinely confirmed such nominees, with no evidence that any Senator raised an FVRA objection. Respondent suggests (Br. 56) that Senators considering such nominations might have believed that the nominees were serving under "one of the 40 other statutes that provide independent, alternative avenues for installing acting officers." *Ibid.* (citing *Senate Report* 16-17). But that misapprehension would not have been plausible: all but three of the 111 cited designations were made to positions that are not covered by any of those

alternative-designation statutes. Compare *Senate Report* 16-17 with Gov't Br. App. 1a-81a.[6]

Respondent alternatively posits (Br. 56) that the Senate might not have known that nominees serving in an acting capacity were not first assistants. That is equally mistaken. Many nominees were to high-profile positions, such as the Deputy Attorney General or Secretary of the Air Force. See Gov't Br. 15-16. A number of nominees came to their acting positions from entirely different agencies (and thus had to have been designated under Subsection (a)(2)). See, *e.g.*, Gov't Br. App. nn.31, 36, 50, 54, 59, 73, 79, 81, 82, 84, 113. Others had served on an acting basis in positions different from the ones identified as first assistant by statute, regulation, or published *Federal Register* notice. See, *e.g.*, *id.* nn.16, 41, 55, 77, 83, 87, 94. And still others were elevated to acting posts after service in entirely separate divisions of the agencies where they worked. See, *e.g.*, *id.* at nn.2, 5, 7, 21, 22, 26, 45, 49, 60, 61, 62, 71, 89.

Respondent alternatively posits (Br. 57) that the Senate might not have wished to refrain from confirming qualified nominees. But it offers no explanation

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[6] In the three remaining instances, the non-FVRA statute was facially inapplicable. See 15 U.S.C. 633(b)(1) (authorizing Deputy Administrator of Small Business Administration to serve as Acting Administrator); Gov't Br. App. 58a (showing Santanu Baruah held different post); 12 U.S.C. 635a(b) (authorizing First Vice President of Export-Import Bank to serve as Acting President); Gov't Br. App. 27a (showing James Lambright held different post); 29 U.S.C. 153(d) (stating that designation of Acting General Counsel of the National Labor Relations Board expires at end of Senate Session in which the President submits a nomination); Gov't Br. 17-18 (showing Lafe Solomon's nomination was pending in multiple Sessions).

for why Senators who perceived Presidents as encroaching on their role would not have expressed that disagreement in *some* fashion—such as through holding hearings, making speeches, introducing statutory amendments, or soliciting reports from congressional watchdog agencies. That silence is particularly telling because the FVRA was passed precisely because Congress had been closely watching the designation practices of the Executive, and because Members of Congress had taken every one of those steps to object when they perceived encroachments on Congress's authority under the Vacancies Act. See Gov't Br. 6-7. But it was not until after the decision in this case called into question the longstanding interpretation of the FVRA that one Senate Committee declined to hold confirmation hearings on two nominees until they stepped down from acting posts, and the chairman of another Committee questioned an official's continued acting service. Pet. 28-29.

2. Respondent offers no reason to depart from the principle of placing "significant weight upon historical practice" in interpreting provisions that "concern the allocation of power between two elected branches of Government." *NLRB* v. *Noel Canning*, 134 S. Ct. 2550, 2559 (2014) (emphasis omitted); see Gov't Br. 48-50. The cases on which respondent relies for the proposition that "'legislative silence' does not amount to approval," Resp. Br. 59, did not concern statutes that relate to the elected Branches' institutional prerogatives and interactions. Established practice warrants great respect in that context. That is especially so concerning the advice-and-consent process, which contemplates particular scrutiny and affirmative approval by the Senate of each nominee as a precondi-

tion to appointment. Indeed, congressional inaction has particular persuasive value in areas of frequent congressional involvement. See *Zuber* v. *Allen*, 396 U.S. 168, 185 n.21 (1969).

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

IAN HEATH GERSHENGORN
Acting Solicitor General

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